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BEFORE THE  
**Surface Transportation Board**

WASHINGTON, D.C. 20423

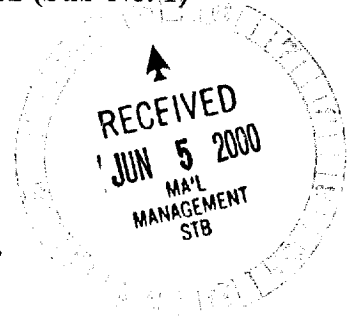
**In the Matter of:**

**Major Rail Consolidation Procedures**

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**STB Ex Parte No. 582 (Sub-No. 1)**

**REPLY COMMENTS OF  
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.**



The Society of the Plastics Industry, Inc. (SPI) respectfully herewith submits its Reply Comments addressing the comments submitted to the Surface Transportation Board (STB) in response to the Advance Notice of Proposed Rulemaking concerning the Board's policies and procedures governing the consolidation of Class I railroads.

After reviewing the comments filed by participants in this proceeding, it appears the parties are in three major "camps." SPI's Reply Comments will address the theme most prevalent in each "camp."

The first camp consists of those who believe that the Board's policies governing review of major railroad consolidations are out of date, and have led to an inordinate concentration of economic power in a handful of railroads. This latter result is a by-product of the regulations promulgated by the Interstate Commerce Commission (ICC) and adopted by the STB upon its creation as the successor to the ICC. These regulations, and the track records of both the ICC and STB, presume that rail consolidations are beneficial. Therefore, when industry and

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government agencies have complained about the reduction in competition, which inevitably accompanies industry consolidations, these complaints have often been viewed as speculative and not necessarily harmful. Moreover, the regulations, as currently written, tolerate harmful effects if tempered by other factors, including the ability of the merging carriers to realize the full benefits of their consolidation.<sup>1</sup>

Included in this first camp are the shipping community, which has long vented its frustration with agency policies, most recently in the Board's Ex Parte No. 575 *Review of Rail Access and Competition Issues*. Additionally, the General Accounting Office recently issued two reports which document the wide-spread shipper dissatisfaction.<sup>2</sup> Also in this camp are federal, state and local government agencies. Moreover, the shortline and regional railroads, long time supporters of the Class I railroads, have expressed concern about the market power wielded by their Class I connectors. In essence, the shortline and regional railroads have publicly conceded their captivity to their Class I connectors.<sup>3</sup>

A substantial number of parties representing multiple facets of the community dependant upon Class I rail service have advanced suggestions and recommendations not only for revision of the railroad consolidation regulations and policies, but also for taking the next step and assuring balance throughout the railroad system. SPI will not catalog or address the various suggestions in detail. Rather, SPI urges the Board to recognize that the overwhelming and virtually unanimous sentiment of those dependant upon Class I railroads to move freight or to

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<sup>1</sup> See 49 C.F.R. § 1180.1.

<sup>2</sup> *Railroad Regulation: Current Issues Associated With the Rate Relief Process*, GAO (Feb. 1999); *Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990*, GAO (Apr. 1999).

<sup>3</sup> Indeed, the American Short Line and Regional Railroad Association noted that "Some ASLRRA-member railroads are participating individually in this rulemaking proceeding. Others probably would have participated individually if they were not fearful of the reaction of their class I connection." Comments at 2, n.2 (Mar. 8, 2000).

serve their communities and constituents evidences that the current system needs major overhaul. SPI further urges the Board to utilize these suggestions and recommendations as a road map for this much needed overhaul.<sup>4</sup>

This call for change by SPI, and by the user community generally, is made out of a desire for a strong and vigorous rail transportation industry. Railroads have had their way for twenty years -- consolidating, expanding single line service and increasing economic control over their customers and connecting railroads. The results of this increase in market power are: (i) rail service which is less reliable with slower transit times than rail service provided years and decades ago when there were more railroads and substantially more interline exchanges; (ii) an inability to effectively manage integration of acquisitions, leading to service disruptions which have been expensive, not only for the acquiring carriers but also for their customers, Class I and shortline connectors, and the economy as a whole, and (iii) premium prices paid for acquisitions which have undermined the market value of the acquiring carriers and led to imposition of rate increases on customers in order to pay for the overpayments.

In network industries which have been opened to competition (telecommunications, gas pipeline, energy and airlines), as well as industries which are inherently competitive, marketplace forces have led to a sharpened focus and improvements in customer service. The existing railroad consolidation and regulatory policies, leading to maintenance and enhancement of market power, have failed to provide a stronger, more competitive and more viable railroad industry. The railroad industry “mantra” that they cannot afford to compete is brought into question by the railroads’ own initiatives, *e.g.*,

- build-ins to the Powder River Basin and specific shipper locations;

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<sup>4</sup> SPI endorses the consensus Principles for Reform of Merger Proceedings and Related Regulation, associated as Appendix A to this Reply.

- selection of Burlington Northern/Santa Fe (BNSF) by Union Pacific (UP) to replace competition from the Southern Pacific (SP) in the UP/SP merger; and
- the creation of Shared Assets Areas and other dual service instituted by CSX and Norfolk Southern in the division of Conrail.

The competitive marketplace must be allowed to fully guide the railroad industry in the future, as originally intended by the Staggers Rail Act of 1980.

The second camp consists of those Class I railroads that concede that some *limited* revision of railroad consolidation regulatory policy would be appropriate. These parties consist of BNSF and Canadian National, whose proposed consolidation serves as the genesis for this proceeding, and the Union Pacific and Kansas City Southern Railroads. SPI welcomes their recognition that the *status quo* cannot be maintained, although SPI disagrees with some of their specific proposals.<sup>5</sup> SPI notes that KCS has previously exhibited a much more competitive attitude than demonstrated by other Class I railroads, both by its build-in initiatives (Baton Rouge and Geismar, Louisiana) and also by its aggressive position in seeking to provide “replacement competition” for the loss of the Southern Pacific during the UP/SP merger. In

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<sup>5</sup> UP proposes that future consolidations be accompanied by a condition requiring the merging carriers to bear any substantial transportation costs incurred by customers due to service disruptions. Union Pacific’s Comments and Initial Proposals at 6-10 (May 16, 2000). UP managed its service meltdown claims process in a manner viewed in a positive light by many shippers. While in principle UP’s proposal is helpful, the details it proposes could eviscerate the remedy and, deprive shippers of remedies otherwise available. Damages should not be limited merely to “reimbursement of incremental transportation costs,” nor should access be conditioned upon a formalistic approach as proposed by UP, entailing a sixty day degradation of service and a sixty day cure period, with degradation measured at a level of 50% from pre-consolidation levels. The Board did not impose such an extended, or quantified, measurement in Ex Parte No. 628, *Expedited Relief for Service Inadequacies*, (served Dec. 21, 1998); nor is such quantification required here. With regard to the damages, there is an established body of case law dealing with the failure to provide service on reasonable request; and contracts may bear their own remedial provisions, and otherwise would be subject to state law. There is no reason for the Board to preempt and narrow the remedies as proposed by UP. Accordingly, SPI urges the Board to limit any condition to one requiring the merging carriers to bear financial responsibility for costs and losses incurred as result of service disruptions.

particular, SPI commends KCS for its position opposing the creation of a two-carrier North American railroad structure.<sup>6</sup>

The third camp is comprised of those who simply want to maintain the *status quo*, subject perhaps to some tweaking of procedural rules which would constitute little more than window dressing. Those parties consist of Canadian Pacific, CSX, Norfolk Southern and the Association of American Railroads. Their posture reflects the maintenance of the policies of the past.

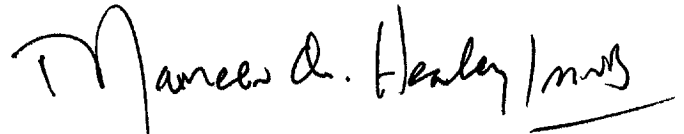
The Board is at a crossroads, with two very distinct choices for determining the future path of the railroad industry. The first choice would be for continuing the aggregation of railroad market power that will, ultimately, result in two transcontinental carriers. This choice will continue to insulate railroads against marketplace disciplines, and ensure that railroads have the opportunity to impose the costs of their acquisitions and of any consequential service disruptions upon the captive shipper community. The other choice, and clearly the choice SPI supports, would be for the free market dynamics of other network industries to finally begin applying to the railroads. The Board has the opportunity to begin that transition with this proceeding.

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<sup>6</sup> Comments of the Kansas City Railway at pp. 14-17 (May 16, 2000). Notwithstanding its opposition to a two-carrier industry structure, KCS proposes that it be distinguished, due to its size, from other Class I carriers in regulatory review in a potential acquisition. SPI respectfully submits that any such differentiation should be made in the context of a specific merger proposal, where the facts can be evaluated. Acquisition of KCS by UP or CN would pose substantially different competitive implications than, for example, acquisition of KCS by CP. As the self-claimed "NAFTA Railroad," the implications of a KCS acquisition well may be significant nationally as well as regionally.

WHEREFORE, THE PREMISES CONSIDERED, The Society of the Plastics Industry, Inc., respectfully urges the Surface Transportation Board to move aggressively to reform its railroad consolidation procedures and its rail regulatory policies in general.

Respectfully submitted,

A handwritten signature in black ink that reads "Maureen A. Healey / mwh". The signature is written in a cursive, flowing style.

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June 5, 2000

**CERTIFICATE OF SERVICE**

I, Carolina Moore, a secretary at the law firm of Keller and Heckman LLP, do hereby certify that a copy of the foregoing REPLY COMMENTS was served this 5<sup>th</sup> day of June, 2000 on all parties of record by mailing, U.S. First Class mail, postage prepaid:

By: Carolina Moore

**PRINCIPLES FOR REFORM OF MERGER PROCEEDINGS  
AND RELATED REGULATION**

Upon review of the statements filed in Ex Parte No. 582 (Sub-No. 1), many members of the rail customer community recognize our growing consensus on issues raised by the concentration of railroad market power in the U.S. and the danger of the emergence of two huge monopoly railroads in North America. Our consensus is reflected in the following pro-competitive principles, which should guide the Surface Transportation Board in its development of improved policies and procedures:

- ◆ Stronger action must be taken to hold merging railroads accountable for their promises of improved service and more efficient operations.
- ◆ The severe service problems that have resulted from past railroad mergers must be prevented and/or mitigated through effective remedies, including performance guarantees, compensation and access to other railroads.
- ◆ Current regulatory policies, including the bottleneck decision, the “one-lump” theory, and the “2-to-1” rule, have failed to prevent the reduction of competition among major railroads, which now enjoy unprecedented market power.
- ◆ The regulatory policies of the past, which the STB has recognized as inadequate and which even many railroads are now recognizing as flawed, should be replaced by new policies aimed at promoting competition.
- ◆ Access remedies such as trackage rights and switching on fair and economic terms should be more readily available, whether or not there are future mergers.
- ◆ Contractual and operational barriers to competition from smaller railroads should be eliminated or reduced, whether or not there are future mergers.
- ◆ Gateways for all major routings should remain open on reasonable terms.
- ◆ Adverse impacts of rail consolidations on the safety of rail operations and on the interests of rail labor should be mitigated.
- ◆ Cross-border mergers should not interfere with effective regulation and the enhancement of competition; and
- ◆ Railroad mergers can no longer be considered in isolation.

The need for improved and enhanced competition along these lines is so strong and immediate that the STB should use the full extent of its authority to revise its policies consistent with these principles. The Board’s efforts in Ex Parte No. 582 (Sub-No. 1) should include, but not be limited to, all of the recommendations in the proceeding that would:

1. Increase competition among railroads;
2. Improve service and safety; and
3. Address any problems or flaws—present or future—that result directly or indirectly from rail mergers.

Recognizing that the Board may not have the necessary authority to fully achieve comprehensive policy reform consistent with all of the above-listed principles, the rail customer community will continue to press for congressional action that would provide the necessary legislative direction to achieve these principles.